

1 UNITED STATES DISTRICT COURT

2 NORTHERN DISTRICT OF WEST VIRGINIA

3 Keith Reed, et al.,

4 Plaintiffs,

5 VS.

CIVIL ACTION NO.

6 5:19-cv-263

7 Alecto Healthcare Services  
8 Wheeling, LLC,  
9 Defendant.

10 - - -

11 Proceedings had in the status conference of the  
12 above-styled action on August 25, 2022, before Honorable John  
13 Preston Bailey, District Judge, at Wheeling, West Virginia.

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15 APPEARANCES:

16 On behalf of the Plaintiffs:

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1 Thursday Afternoon Session,  
2 August 25, 2022, 2:00 p.m.

3 - - -

4 THE CLERK: This is the case of Reed, et al., versus  
5 Alecto Healthcare Services, LLC, et al., Civil Action Number  
6 5:19-CR-263.

7 Will the parties please note their appearance for the  
8 record.

9 MR. POMPONIO: Good afternoon. Bren Pomponio and  
10 Molly Davidson-Welling, Tim Cogan and Alex Risovich on behalf  
11 of the plaintiffs.

12 MR. RHEIN: Mitchell Rhein and Chelsea Thomas of  
13 Spilman, Thomas & Battle on behalf of defendant.

14 THE COURT: All right. We are here for a number of  
15 issues, probably more than you had bargained on.

16 Where are we on notice to the class?

17 MR. POMPONIO: We're waiting for approval from the  
18 Court. We have obtained an administrator that is willing to  
19 get the notice out quickly, as soon as it's approved.

20 THE COURT: Have you all agreed on a notice?

21 MR. POMPONIO: We've filed it with the Court and we  
22 didn't hear anything from defendants about any objections they  
23 had to it.

24 MR. RHEIN: We have no objections to the notice  
25 insofar as we're going to -- insofar as class damages are

1 decided after notice. We have more of an objection to the  
2 timing of things --

3 THE COURT: I understand that.

4 MR. RHEIN: -- than the content of the notice.

5 THE COURT: So I'll approve the notice.

6 MR. POMPONIO: Your Honor, there's a couple dates  
7 that we need from the Court.

8 THE COURT: That's why I'm having him get that for  
9 me. That really wasn't on the docket for today, so they didn't  
10 give it to me.

11 Assuming I give you dates today, how soon can you get  
12 notice out?

13 MR. POMPONIO: The administrator says they need ten  
14 business days to get the notice out.

15 THE COURT: All right. So that's -- let's say we use  
16 September 12th, which is -- so the opt-out deadline would be  
17 October 17.

18 MR. RHEIN: Yes, I think that's right, based on 35  
19 days.

20 THE COURT: And then we have to set a class damages  
21 hearing. Why can't I set the ground rules for class damages  
22 today?

23 MR. RHEIN: Why can you not set the ground rules, are  
24 you talking about the general framework of what they may  
25 recover or --

1 THE COURT: Yes.

2 MR. RHEIN: -- the individuals' damages? I think as  
3 part of the law of the case, that's going to be the natural  
4 result. Some of the plaintiffs will have very similar or  
5 identical components of their damages that the class would. My  
6 objection is more to deciding, class member number one, your  
7 damages are X., class member number two, your damages are X.

8 THE COURT: What's wrong with making the calculation  
9 even if I don't award anything based on that calculation until  
10 we see whether they opt out?

11 MR. RHEIN: What's wrong with making the calculation  
12 before -- I think there's a couple things. Logistically, I  
13 don't think -- the math that would have to go into deciding  
14 class members' damages hasn't been done yet. Plaintiffs, the  
15 way they've calculated plaintiffs' damages, don't account for  
16 individuals who have earned backpay after -- within the  
17 violation period. There are things that would have to be  
18 calculated to decide that. That's a pragmatic aspect to it,  
19 but there --

20 THE COURT: We could complete that calculation before  
21 October 17th.

22 MR. RHEIN: Yeah, I think we could complete that  
23 calculation before October 17th. I mean, there's 6 --  
24 plaintiffs' calculation is 696 plaintiffs. I think that could  
25 be done before October 17th, but that's the pragmatic aspect to

1 it, but I think there's a due process aspect to it as well,  
2 which can I sit back and wait and see what my damages are and  
3 then decide whether or not I'm going to opt out or not.

4 THE COURT: That's assuming that they would know.

5 MR. RHEIN: Yeah. Correct. I guess I'm not  
6 understanding how this situation would unfold? Are we going to  
7 decide today that class member one is going to get --

8 THE COURT: I'm not going to decide that today. What  
9 I'm going to decide today is I'm going to rule on your  
10 objections to what they have so far. And I'm going to tell  
11 them to go recalculate the damages in accordance with those  
12 rulings, and then I will have them turn their new calculations  
13 over to you by a certain date to see if there are any  
14 additional objections.

15 MR. RHEIN: Okay.

16 THE COURT: Anything wrong with that?

17 MR. RHEIN: I don't think there's anything wrong with  
18 that.

19 THE COURT: Okay.

20 MR. RHEIN: We would be fine with that.

21 THE COURT: All right.

22 We have a number of objections raised. The first  
23 objection is that the period of the violation is 33 days. I  
24 think that's correct. You have anything to the contrary?

25 MR. POMPONIO: Yes, Your Honor. There's a number of

1 problems, legally speaking, with the defendant's objections.  
2 We'll start first with the assumption that the Court ruled that  
3 good notice was provided on August 8th. The Court's order  
4 states even if the August 8th, 2019 letter met all the  
5 statutory requirements, the letter was not sent timely, so we  
6 don't believe that the Court has made that finding that that  
7 notice that went out then was good notice. And there are  
8 several reasons why it wasn't.

9 The WARN Act requires that the notice be specific and  
10 based on information -- best information available at the time  
11 it's served. And that's at 20 CFR Section 639.7(a). That  
12 notice is supposed to provide effected employees, provide them  
13 whether or not the planned action is expected to be permanent  
14 or temporary, the expected date when the plant closing or mass  
15 layoff will commence, and the expected date when an individual  
16 employee will be separated. And that's in the same CFR  
17 section, but it's in paren (d).

18 And the -- in promulgating these regulations, the  
19 U.S. Department of Labor said that, quote, the date of the  
20 layoff or schedule of layoff dates is essential to enable all  
21 recipients of notice to understand when the employment losses  
22 actually will occur. And that's at the 54 Federal Register  
23 16042-01. That's a cite. The page that it's on is 16060.

24 Let's talk about what the Court seems to have  
25 actually concluded in its order. The Court concluded that the

1 plant closing occurred on September 4th, 2019. That's at the  
2 Court's order at page 23. The notices state that the closing  
3 is -- would be on October 7th. So that essential aspect to the  
4 notice is missing in this case.

5 The other requirement, that it be based on the best  
6 information available at the time the notice was sent out, is  
7 also missing in this case as a matter of law. The Court --  
8 another holding of the Court in its order was that the  
9 defendants didn't qualify for the faltering business defense,  
10 and that discussion is at the Court's order, pages 33 to 34.

11 And in that discussion, the Court correctly noted the  
12 defendants were aware no later than June 30th, 2019, that it  
13 lacked the capital to continue running the hospital, yet it  
14 didn't send out the notice at that time. And the Court goes on  
15 to indicate, had they sent the notice out at that time, 60 days  
16 would have passed before the hospital shut down. And so the  
17 Court has already, on the record that is before it, observed  
18 that this notice did not contain -- did not contain the date of  
19 the plant closing and did not -- was not based on the best  
20 information available to the defendants at the time it was  
21 served.

22 In fact, the facts which do not appear to be in  
23 dispute were that AHS was circulating internal documents on  
24 August 6th, 2019, two days before they sent out the notice, the  
25 so-called notice in this case, that identified -- that was



1 going to identify to the regulators a September 8th, 2019, as  
2 OVMC's target closure date. And that time line, that target  
3 closure time line, is at Exhibit 28 to plaintiffs' motion for  
4 class certification. And I have a copy of that, if the Court  
5 would like me to tender that.

6 AHS revised that time line, before submitting it to  
7 the regulators, to October 1st, but then, as we know, they shut  
8 down the hospital on September 4th, very close in time to the  
9 original target closure date.

10 Once that August 8th correspondence, the so-called  
11 notice, was sent out, the defendants began closing the  
12 hospital. In particular, they stopped accepting new patients  
13 after August 21st, and -- 2019, and that's located -- the  
14 evidence of that is located at Exhibit 21 at page 9 of  
15 plaintiffs' motion for class certification. They cut off  
16 several offered services, including MRIs, by August 19th.  
17 That's located at Exhibit 24 to the motion for class  
18 certification. They terminated medical office leases by August  
19 30th. And that's Exhibit 25 to the motion for class  
20 certification. And they reduced inventory and told patients in  
21 mid-August, on August 15th, that OVMC could close any time  
22 before October 7th. And that's at Exhibit 26 to the motion for  
23 class certification.

24 As they cut these services all through August, they  
25 continued to reduce and lay off employees, class members, to

1 save themselves money, and to avoid what the WARN Act requires,  
2 and that is 60 days' either notice or wages and benefits.

3 So under the circumstances and the facts that don't  
4 appear to be subject to any dispute, the October 7th date was a  
5 sham. And the defendants here used a clever recordkeeping  
6 accounting trick.

7 THE COURT: I know what they did.

8 MR. POMPONIO: And so that notice is not recognized  
9 notice under the WARN Act. It doesn't have the essential  
10 elements in which to inform the class and the employees of the  
11 impending closure, and so therefore the defendants should not  
12 be -- should not receive any credit for the time between August  
13 8th and September 4th in which they're trying to claim credit  
14 for now.

15 Additionally, the WARN Act provides specifically when  
16 the notice period may be reduced. And that's at 29 U.S.C.  
17 Section 2102. And none of -- the defendants don't meet any of  
18 those conditions in which they can effectively reduce the  
19 notice period or the violation period in this case.

20 THE COURT: You'll agree, though, that if I find the  
21 August 8 letter to be sufficient, that then you're only  
22 entitled to 33 days?

23 MR. POMPONIO: No. Because we also have a dispute  
24 about this -- about the calculations the defendants do in which  
25 they propose to eliminate weekends in the calculation of this

1 violation period. There's -- of course, the Court is probably  
2 aware of the circuit split between whether or not there's a  
3 calendar day or workday model used for the calculation of the  
4 backpay.

5 THE COURT: And the Fourth Circuit says?

6 MR. POMPONIO: The Fourth Circuit has not passed on  
7 that, but --

8 THE COURT: They affirmed Judge Keeley.

9 MR. POMPONIO: They did affirm Judge Keeley, but they  
10 didn't take up that issue at all. And the reason that they  
11 didn't take up that issue at all is because Judge Keeley did  
12 not omit weekends from her backpay calculations. I mean, Judge  
13 Keeley specifically, on page 527 of the *UMWA v. Martinka Coal*  
14 *Company* case, and the citation is 45 F.Supp. 2d 521 and the  
15 pinpoint is at 527, she acknowledged that the workers -- the  
16 class members worked on Saturdays and Sunday. And, some of  
17 them were even regularly scheduled.

18 And that's what you have here. You have a hospital  
19 that is open 24 hours a day, seven days a week. People are  
20 working all through the weekends.

21 THE COURT: Seven days?

22 MR. POMPONIO: Right.

23 THE COURT: I mean, one employee is working seven  
24 days?

25 MR. POMPONIO: I'm certain that there's examples of

1 people that have worked seven-day shifts, and they would get  
2 overtime for that, but we're at a disadvantage in this case, to  
3 no fault of the plaintiffs, because the only payroll records  
4 that were produced by the defendants were starting August 2019,  
5 after the shutdown started to begin. So we don't have payroll  
6 records going back in time to show where everybody else has --  
7 what the class worked, what exactly were their regular --  
8 regularly scheduled hours.

9 Presumably, the defendants didn't pay their vendor  
10 and they were unable to obtain those, but they said in  
11 discovery they don't have them and they couldn't turn them  
12 over, so all we've got is August 2019 and September 2019 going  
13 into the October 7th date. And so there -- the defendants  
14 can't produce any evidence and say, no, this plaintiff's  
15 calculation is not consistent with the workday method, where  
16 you have a situation where people are working seven days a  
17 week, different employees. And to just arbitrarily say, let's  
18 not put down any backpay, any wages for weekends, wouldn't be  
19 consistent with how people were paid and how people worked at  
20 the hospital.

21 THE COURT: Didn't you calculate on the basis of five  
22 days?

23 MR. POMPONIO: We have done those calculations, and  
24 when Your Honor was asking opposing counsel about doing all the  
25 calculations consistent with whatever your rulings are, we have

1 done that. And we have the charts prepared here today.

2 THE COURT: Same charts you've already given me?

3 MR. POMPONIO: No. We have done other ones,  
4 contingent ones, based on how the Court would rule today. And,  
5 in fact, the charts that we gave you need to -- we concede that  
6 any wages paid by these defendants for work done at OV -- at  
7 this hospital would be a credit to them. But we have not given  
8 them the credit of wages paid for work done at EOVB, at the  
9 East Ohio Valley Hospital, which is owned by a separate entity,  
10 a nonparty to this case, and the WARN Act says specifically  
11 when wages paid -- when the defendants get credit for that and  
12 there's no authority that third party nonparty defendants --  
13 nonparties, that wages paid by nonparties could be credited to  
14 these defendants.

15 So we've prepared 60 days -- 60 individual days of  
16 backpay that also provide the credit for the wages actually  
17 paid to the class and the plaintiffs based on their work at  
18 OVMC. And we've also included the damages for those class  
19 members who were flexed earlier than the plant closure in  
20 advance -- the facts being that they knew that they were going  
21 to close this back in June, when MPT told them that they  
22 weren't going to provide any more capital, and so there's --  
23 those individuals that had less than 33 days, they're included  
24 in our calculations as well.

25 MR. RHEIN: For the last point, I don't understand

1 why we're changing the plaintiffs' claim for damages at this  
2 point. My understanding was based on the calculations that I  
3 saw from plaintiffs. If you talk about the violation period,  
4 they cut off the class at October 8th, which assumes that 60  
5 days between August 8th, when the notice went out, and October  
6 7th, and that anyone after that is outside the class. That's  
7 why we went with the August 8th, because that's what the  
8 Court's order said, and that's what plaintiffs' damage  
9 calculations assumes implicitly.

10 On top of that, we did not arbitrarily cut out  
11 weekends. We cut out days that were not working days within  
12 plaintiffs' assumptions. Plaintiffs' assumptions are based on  
13 five workdays a week for each plaintiff. If you had a  
14 plaintiff who worked 36 hours in a week, they have expanded  
15 that over five days by assuming each employee works 7.2 hours  
16 in a five-day workweek. That's all we did, and all we did was  
17 cut out any days that would not have been working days based on  
18 an assumed five-day workweek for each plaintiff and each member  
19 of the potential class, which is consistent with this Court's  
20 order which was affirmed by the Fourth Circuit.

21 But I do think -- sorry to -- I do think one thing  
22 that we can do, if what we're going to do today is we're going  
23 to make some findings that we can apply to class-wide damages,  
24 one of the things that fundamentally I think is easy to do here  
25 today is what is the violation period. And then within that

1 violation period, what are the days that are the defendants  
2 required to pay backpay, so work days or calendar days.

3 Our position is that there's a 33-day violation  
4 period, and within that violation period there are 23 working  
5 days. If we have that information, it should not be hard for  
6 the two parties to get together at that point, look at the  
7 hours worked or the wage rates, figure out a daily rate, and  
8 multiply it by the number of days they're owed for backpay.  
9 That issue should be pretty easy to decide today, and I think  
10 would be appropriate.

11 THE COURT: All right. The violation period is  
12 August 8th to October 7th. I'm going to find that the August 8  
13 letter was insufficient, and so it will be based on a 60-day  
14 period. However, it would be working days, not calendar days.  
15 There must be an offset -- I think everybody's realized that --  
16 for wages that were paid.

17 There will be no damages for one month's health plan  
18 premium, and we will take up the issue of attorney's fees  
19 after, in accordance, actually, with the brief schedule saying  
20 fee request, 14 days after the class damages hearing and  
21 additional 14 days for you all to respond.

22 How soon can you get your damages, in accordance with  
23 that, to the defendant?

24 MR. POMPONIO: I just have one question. If the  
25 Court -- I'm confused about the violation period. If the Court

1 finds that the notice was inadequate, then shouldn't the notice  
2 period run from the date of the shutdown, because no notice was  
3 provided, September 4th to November 4th. And that would be 60  
4 days.

5 And then -- if that is the correct violation period,  
6 then I'd like to make just very quick argument about the one  
7 month of health care benefits, because there's no evidence that  
8 individuals -- the class received their health care benefits  
9 after October 7th. So that would be another element of the  
10 damages that would be undisputably owed to the class. And but  
11 to answer your --

12 THE COURT: You think you can do that?

13 MR. POMPONIO: What's that?

14 THE COURT: Do you think you can do that?

15 MR. POMPONIO: Absolutely, Your Honor. There's no  
16 notice --

17 THE COURT: I'm talking about make a brief argument.

18 MR. POMPONIO: Yeah, I think I can. But to answer  
19 your argument -- I mean, your question directly, Your Honor, we  
20 have calculated the proposed damages for the class and the  
21 individual plaintiffs consistent with a 60-day violation period  
22 and a five-day workweek.

23 THE COURT: Have you provided those to defense?

24 MR. POMPONIO: No. We just brought them here today  
25 and -- but we'll be happy to --



1 THE COURT: How long do you all need to look at them?

2 MR. RHEIN: For the class-wide damages?

3 THE COURT: Yeah.

4 MR. RHEIN: Thirty days.

5 THE COURT: Let's have a hearing on September 26 at  
6 3:00 on the damage issues. Obviously, if you all can agree on  
7 numbers, we won't have it. I don't need to be in here. And  
8 that's probably all I need to say right now, isn't it? Do you  
9 want another hearing?

10 MR. RHEIN: Not really, but I love being up here. I  
11 love Wheeling. So I love coming up, any opportunity to come up  
12 to Wheeling, of course.

13 I just want to clarify, September 26 we're deciding  
14 the issues related to class-wide damages.

15 THE COURT: Yes.

16 MR. RHEIN: Consistent with whatever ruling -- your  
17 rulings today.

18 THE COURT: Consistent with my rulings today and  
19 consistent with what you guys work out.

20 MR. RHEIN: Right.

21 THE COURT: Now, I will take back what I said about  
22 the insurance premiums. You're correct. Without the letter,  
23 then it's September 4th to November 3rd.

24 MR. POMPONIO: Through November 3rd, I believe.

25 THE COURT: Yeah.

1 MR. RHEIN: If that's the case, then is our class  
2 definition correct at this point? I want to make sure we get  
3 this straightened out to the extent we can today so that we're  
4 able to -- if we are able to have a discussion with plaintiffs'  
5 counsel about numbers, I want to make sure it's as accurate as  
6 possible that we're talking about one class.

7 THE COURT: The class, as I understand it, as I  
8 remember, is all employees employed at Ohio Valley Medical  
9 Center who suffered an employment loss as a result of OVMC's  
10 plant closing in 2019 without receiving 60 days' advance notice  
11 as required by the Worker Adjustment and Retraining  
12 Notification Act.

13 MR. RHEIN: Okay. And based on plaintiffs'  
14 calculations, they had 696 employees, and that's based on  
15 employees who were no longer working prior to October 8th,  
16 2019. And if we're changing that, that's obviously going to  
17 change plaintiffs' idea of who is defined within the Court's  
18 class, which then changes who gets the notice, providing  
19 addresses for who the notice is, and changes the scope of the  
20 damages in this case, obviously.

21 MR. POMPONIO: It doesn't cause any difficulties at  
22 all. All the people that are entitled to damages under the  
23 class definition will get notice. It will change some, but  
24 it's not anything that creates any type of due process problem  
25 or any administrative problem or anything like that.

1 MR. RHEIN: I'm assuming plaintiffs' damage  
2 calculation does not include -- their damage calculations you  
3 brought today, we have 30 days to respond to, does not include  
4 employees who were paid after October 8th, 2019, correct?

5 THE COURT: Anyone get paid after October?

6 MR. RHEIN: Yes. I just want to make sure that we  
7 have -- that's what I want to decide today. I don't want to  
8 relitigate things either today, but my reading of the Court's  
9 summary judgment order was that notice provided on August 8th  
10 was sufficient, right?

11 THE COURT: No, I don't think I did, did I?

12 MR. POMPONIO: No.

13 THE COURT: No. I said assuming it was good, it was  
14 still --

15 MR. RHEIN: The order says, on page 30, the letter  
16 sufficiently states whether the closing is permanent or  
17 temporary, provides the expected date when OVMC was closing,  
18 and the name and telephone number of a company official to  
19 contact for further information. The letter does not indicate  
20 whether or not bumping rights exist. However, failing to  
21 include -- failing to include mention of bumping rights is not  
22 fatal to the notice's effectiveness.

23 MR. POMPONIO: The Court made no findings as to  
24 the -- whether or not the correct date was -- of the closure  
25 was included in the notices and whether it was based on best

1 information available, and the Court went on to say, after that  
2 discussion, that even if the August 8, 2019 letter met all  
3 requirements, it was not sent timely.

4 MR. RHEIN: I'm just reading what it says.  
5 Obviously, you know better than I do.

6 THE COURT: He's getting me a copy of what I said.

7 MR. RHEIN: Okay.

8 MR. POMPONIO: Your Honor, I have a copy, if you'd  
9 like me to provide --

10 THE COURT: Then he'd feel rejected by having run out  
11 of here.

12 MR. RHEIN: Usurped.

13 THE COURT: For naught.

14 MR. POMPONIO: While we're waiting, Your Honor, this  
15 idea that more individuals will be included in the class  
16 because they worked some between October 7th and November 3rd,  
17 4th, however you want to say it, there will be a handful of  
18 people, not many --

19 THE COURT: We're jumping the gun. Let's see what I  
20 say first. I may have to retract this and go back to what the  
21 defendants want.

22 Okay. I'll admit I'm a little ambiguous, but here's  
23 what it's going to be. We're going to use the 33 days. We're  
24 going to use working days. There will be no insurance. There  
25 will be an offset based on wages paid. Assuming we don't have

1 the damages worked out, we'll have a hearing on September 26th.  
2 We probably need a fairness hearing, too. And by then we'll  
3 know who's in and out. Let's have a fairness hearing November  
4 7 at 2:00.

5 MR. POMPONIO: Your Honor, can I clarify something?  
6 I took it as when the Court was saying that we're going to use  
7 the 33 days, that you intended that we are going to use the  
8 time -- calculate the violation period as if a notice --  
9 untimely but adequate notice was sent out.

10 The mailbox rule plays into this. So the date in  
11 which the class members would have received that August 8th  
12 letter extends the class by another -- the violation period, I  
13 beg your pardon, by another three days. Is that your  
14 intention, or --

15 THE COURT: It wasn't, but it's a good issue.

16 MR. RHEIN: He's not wrong. I think if the mail went  
17 out on August 8th, three days from that would be a Sunday.  
18 Given extra days, that would be -- assume they get it on the  
19 12th, 60 days from that is it October 11th, so the violation  
20 period would be September 5th to October 11, and that includes  
21 26 workdays. Just add three days, basically. So went from 23  
22 workdays to 26 workdays. That's what I have. And I agree,  
23 that is accurate.

24 MR. POMPONIO: It might be 27, but we can work that  
25 out, I'm sure.

1 MR. RHEIN: Agree with plaintiffs' counsel.

2 THE COURT: A weekend, too, so -- anything else I can  
3 help you with?

4 MR. RHEIN: No, Your Honor.

5 THE COURT: All right. Thank you.

6 (Proceedings concluded at 2:44 p.m.)  
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CERTIFICATE

I, Cindy L. Knecht, Registered Professional Reporter and Official Reporter of the United States District Court for the Northern District of West Virginia, do hereby certify that the foregoing is a true and correct transcript of the proceedings had in the above-styled action on August 25, 2022, as reported by me in stenotypy.

I certify that the transcript fees and format comply with those prescribed by the Court and the Judicial Conference of the United States.

Given under my hand this 12th day of September 2022.

/s/Cindy L. Knecht

\_\_\_\_\_  
Cindy L. Knecht, RMR/CRR  
Official reporter, United States  
District Court for the Northern  
District of West Virginia